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No. 968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ALLIED CENTRAL STORES, INC., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Pursuant to Rule 24(4) of the Rules of the Supreme Court, Petitioner respectfully submits this reply brief to argue one point mentioned in respondent's brief in opposition.

ARGUMENT

On pages 6 and 7 of respondent's brief in opposition, respondent concedes that the decision in *Jackson Oldsmobile, Inc.* v. *United States,* 15 A.F.T.R. 2d 35, 65-1 U.S.T.C. ¶9113 (M.D. Ga. 1964) conflicts in principle with the decision of the Court of Appeals for the Second Circuit in the present case. Respondent, however, attempts to minimize the significance of the conflict by suggesting (1) that in view of its decision in *Foremost Dairies, Inc.* v. *Tomlinson,* 15 A.F.T.R. 2d 362 (5th Cir. 1965) the Court of Appeals for the Fifth Circuit will reverse the *Jackson Oldsmobile* decision, and (2) that a conflict between a court of appeals and a district court in another circuit is not a sufficient basis for review by this Court.

I

Anyone who has read the facts of the *Foremost Dairies, Inc.* case can hardly be of the opinion that it represents a foregone conclusion that the Court of Appeals for the Fifth Circuit will reverse the decision in *Jackson Oldsmobile, Inc.* See *Foremost Dairies, Inc.* v. *Tomlinson,* 12 A.F.T.R. 2d 5426 (N.D. Fla. 1964), aff'd 15 A.F.T.R. 2d 362 (5th Cir. 1965). In *Foremost Dairies, Inc.* v. *Tomlinson* a large, profitable general food distributor merged into a less frozen food distributor with the stockholders of the profitable corporation ending up with over 73% of the stock of the surviving corporation. The major changes in the items sold and the substantial change in ownership made the case similar to *Mill Ridge Coal Co.* v. *Patterson,* 264 F. 2d 713 (5th Cir. 1959), cert. den. 361 U.S. 816 (1959) and *Willingham* v. *United States,* 289 F. 2d 283 (5th Cir. 1961). Quite clearly these precedents in the Fifth

Circuit dictated the decision in the *Foremost Dairies, Inc.* case. The Court in its per curiam merely points out that the district court relied on the *Garfinckel* case in the Second Circuit. Without passing judgment one way or the other, the Court merely added a citation of *Allied Central Stores, Inc.* v. *Commissioner.*

The *Foremost Dairies* case gives little indication of what the Fifth Circuit will do with the *Jackson Oldsmobile* case. In the *Jackson Oldsmobile* case, there was a single owner of the corporation which discontinued a losing Buick dealership and entered a profitable Oldsmobile dealership business in a different state. These facts make it substantially similar to the decision in *Northway Security Company* v. *Commissioner,* 23 B.T.A. 532 (1931) which this Court mentioned in footnote 9 to the *Libson Shops* opinion. *Libson Shops, Inc.* v. *Koehler,* 352 U.S. 382, 390 (1957). The fact that the same owner, General Motors Corporation, suffered 100% of the losses and earned 100% of the later profits in *Jackson Oldsmobile, Inc.* gives a sound equitable, economic and legal basis to the taxpayer's position in that case, as it does in petitioner's case. If Congress intended any corporation to utilize the loss carryover provisions, it must have intended a corporation such as Northway Security Company, Jackson Oldsmobile, Inc. or, for that matter petitioner. Otherwise, denial of loss corryovers would be a serious economic deterrent to discontinuation of a losing activity in order to engage in a more profitable pursuant. See *Norden-Ketay Corporation* v. *Commissioner,* 319 F. 2d 902 (2d Cir. 1963), cert. den. 375 U.S. 953 (1964). Even the Tax Court of the United States, which has been rather harsh in net operating loss carryover situations, in *Kolker Brothers, Inc.* v. *Commissioner,* 35 T.C. 299 (1960) allowed

a single corporation whose business changed but whose ownership changed by only 46 percent to utilize its earlier losses against its later income. In that case, the Government's appeal was dismissed. There is no assurance that the Government will not withdraw its appeal in *Jackson Oldsmobile* and thus deprive the Supreme Court of a conflict at the court of appeals level as it did in the *Kolker Brothers, Inc.* case.

II

Respondent states that even though there is a conflict, a conflict between a court of appeals decision and a district court decision in another circuit is not an adequate basis for review by this Court. While Rule 19.1(b) of the Rules of the Supreme Court mentions that a conflict between a decision of a court of appeals with that of another court of appeals will be given consideration as a basis for review by the Supreme Court, surely this enumeration is not exclusive. There have been occasions when the Court has granted certiorari where there have been conflicts between a court of appeals and a district court in another circuit, especially where an important question of federal law has not been, but should be, settled by the Supreme Court. *Shapiro* v. *United States,* 335 U.S. 1, 4 (1948). It seems unjust to deny certiorari in petitioner's situation where a conflicting district court decision is pending on appeal to another court of appeals and where petitioner cannot delay his petition for certiorari until the other appeal has been decided. *Gulf States Steel Company* v. *United States,* 287 U.S. 32 (1932). It also seems unjust to petitioner that the Government has the opportunity to control whether a conflict develops at the court of appeal level by its power to dismiss its appeal

in the *Jackson Oldsmobile* case and to rely on its *in terrorem* administrative power as it did in *Kolker Brothers, Inc.* thus forcing continued expensive litigation in the lower courts.

CONCLUSION

There exists an acknowledged conflict in principle between the decision of the Court of Appeals for the Second Circuit in petitioner's case and the decision of the Middle District of Georgia in *Jackson Oldsmobile, Inc.* v. *United States.* Existence of this conflict indicates quite clearly that a fundamental difference of opinion exists as to the scope of this Court's *Libson Shops* decision. It is likely that the Court of Appeals for the Fifth Circuit will not consider its decision in the *Foremost Dairies* case as dispositive of the appeal in *Jackson Oldsmobile, Inc.* in view of the fact that there are basic factual differences. The *Foremost Dairies* case is illustrative of the evil with which the Court was apparently concerned in *Libson Shops,* trafficing in loss corporations. The *Jackson Oldsmobile* case involves a single owner of a corporation which changed the location of essentially the same business. Petitioner's case involves a single owner of a corporation which continued its earlier business as well as received additional, similar assets from its parent by way of merger of a sister corporation into it. These basic factual differences indicate that the *Foremost Dairies* case does not portend that the present conflict will disappear, as the respondent would have it. This Court has granted certiorari where a conflict between a court of appeals and a district court in another circuit has existed, especially where an important, unsettled question of federal law is involved as is the case here. This would seem especially appealing where a conflicting

district court decision is currently pending on appeal but where the petitioner cannot delay his petition for certiorari until the other appeal has been decided and it is within the control of the Government whether the appeal is prosecuted to decision and, if so, whether a petition for certiorari will be filed.

Respectfully submitted,

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